

CHAPTER 5

PRISONERS OF WAR AND DETAINEES

References

1. Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 (GPW), *reprinted in* DEP'T OF THE ARMY PAMPHLET 27-1, TREATIES GOVERNING LAND WARFARE (1956) [hereinafter DA PAM 27-1].
2. Hague Convention Number IV Respecting the Laws and Customs of War on Land, October 18, 1907, *reprinted in* DA PAM 27-1.
3. Protocols Additional to the Geneva Conventions of August 12, 1949 and Relating to the Protection of Victims of International Armed Conflict, *reprinted in* DEP'T OF THE ARMY PAMPHLET 27-1-1, PROTOCOLS TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (1979).
4. DEP'T OF DEFENSE DIRECTIVE 5100.77, DoD LAW OF WAR PROGRAM (9 December 1998).
5. DEP'T OF DEFENSE DIRECTIVE 2310.1, DoD PROGRAM FOR ENEMY PRISONERS OF WAR AND OTHER DETAINEES (18 August 1994).
6. CHAIRMAN, JOINT CHIEFS OF STAFF INSTRUCTION 3290.01, PROGRAM FOR ENEMY PRISONERS OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES, AND OTHER DETAINED PERSONNEL (20 Mar. 1996).
7. III INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY TO THE GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR (Pictet ed. 1960)[hereinafter Pictet].
8. DEP'T OF THE ARMY FIELD MANUAL 27-10, THE LAW OF LAND WARFARE (1956) w/ C1 (1976)[hereinafter FM 27-10].
9. DEP'T OF THE ARMY FIELD MANUAL 19-40, ENEMY PRISONERS OF WAR, CIVILIAN INTERNEES, AND DETAINED PERSONS (1976)[hereinafter FM 19-40].
10. DEP'T OF ARMY REG. 190-8, OPNAVINST 3461.6, AFI 31-304, MCO 3461.1, ENEMY PRISONERS OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES AND OTHER DETAINEES, (1 Oct 1997), [hereinafter AR 190-8].
11. DEP'T OF THE ARMY PAMPHLET 27-161-2, INTERNATIONAL LAW, VOLUME II (1962).
12. JA 442, OPLAW HANDBOOK, Chapter 5 (2000).
13. Howard S. Levie, 59 INTERNATIONAL LAW STUDIES, PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT (1977)[hereinafter Levie].
14. Howard S. Levie, 60 INTERNATIONAL LAW STUDIES, DOCUMENTS ON PRISONERS OF WAR (1979)[hereinafter Levie, DOCUMENTS ON PRISONERS OF WAR].

I. HISTORY OF PRISONERS OF WAR

- A. “In ancient times, the concept of “prisoner of war”ⁱ was unknown and the defeated became the victor’s ‘chattel’”...ⁱⁱ Your captive was yours to kill, sell, or put to work. No one was as helpless as an enemy prisoner of war (EPW). In ancient times, the concept of “prisoner of war” was unknown.ⁱⁱⁱ

- B. Greek, Roman, and European theologians and philosophers began to write on the subject of EPW's. However, treatment of EPW's was still by and large left to military commanders.^{iv}
- C. The American War of Independence. For the colonists, it was a revolution. For the British, it was an insurrection. To the British, the colonists were the most dangerous of criminals; traitors to the empire, and a threat to state survival, and preparations were made to try them for treason. However, British forces begrudgingly recognized the colonists as belligerents and no prisoner was tried for treason. Colonists that were captured were however subject to inhumane treatment and neglect. There were individual acts of mistreatment by American forces of the British and Hessian captives; however, General Washington appears to have been sensitive to, and to have had genuine concern for EPW's. He took steps to prevent abuse.^v
- D. First agreement to establish prisoner of war (POW) treatment guidelines was probably the 1785 Treaty of Friendship between the U.S. and Prussia.^{vi}
- E. American Civil War. At the outset, the Union forces did not view the Confederates as professional soldiers deserving protected status. They were considered nothing more than armed insurrectionists. As southern forces began to capture large numbers of Union prisoners, it became clear to Abraham Lincoln that his only hope for securing humane treatment for his troops was to require the proper treatment of Rebel soldiers. President Lincoln Issued General Order No. 100, "Instructions of the Government of Armies of the United States in the Field," known as the *Lieber Code*.
1. Although the Lieber Code went a long way in bringing some humanity to warfare, many traditional views regarding EPW's prevailed. For example, Article 60 of the Code provides: "a commander is permitted to direct his troops to give no quarter, in great straits, when his own salvation makes it impossible to cumber himself with prisoners."^{vii}
 2. Confederate policy called for captured black soldiers to be returned or sold into slavery and for white Union officers serving with black troops to be prosecuted for "exciting servile insurrection."^{viii} Captured blacks who could not prove they were free blacks were sold into slavery. Free blacks were not much better off. They were treated like slaves and forced to labor in the Confederate war effort. In response to this policy, Article 58 of the Lieber Code stated that the Union would take reprisal for any black prisoners of war sold into slavery by executing Confederate prisoners. Very few Confederate

- prisoners were executed in reprisal. However, Confederate soldiers were often forced into hard labor as a reprisal.
3. The Union and Confederate armies operated a “parole” or prisoner exchange system. Toward the end of the war, the Union stopped paroling southern soldiers because of its significant numerical advantage. It was fighting a war of attrition and EPW exchanges did not support that effort. This Union decision may have contributed to the poor conditions in southern EPW camps because of the additional strain on resources at a time when the Confederate army could barely sustain itself. Some historians point out that the Confederate EPW guards were living in conditions only slightly better than their Union captives.^{ix}
 4. Captured enemy have traditionally suffered great horrors as POWs. Most Americans associate POW maltreatment during the Civil War with the Confederate camp at Andersonville. However, maltreatment was equally brutal at Union camps. In fact, in the Civil War 26,486 Southerners and 22,576 Northerners died in POW camps.^x
 5. Despite its national character and Civil War setting, the Lieber Code went a long way in influencing European efforts to create international rules dealing with the conduct of war.
- F. The first international attempt to regulate the handling of EPW’s occurred in 1907 with the promulgation of the Regulations Respecting the Laws and Customs of War on Land (Hague Regulations). Although the Hague Regulations gave EPW’s a definite legal status and protected them against arbitrary treatment, the Regulations were primarily concerned with the methods and means of warfare rather than the care of the victims of war. Moreover, the initial primary concern was with the care of the wounded and sick rather than EPW’s.^{xi}
- G. World War I. The Hague Regulations proved insufficient to address the treatment of the nearly 8,000,000 EPW’s. Germany was technically correct when it argued that the Hague Regulations were not binding because not all participants were signatories.^{xii} According to the Regulations, all parties to the conflict had to be signatories if the Regulations were to apply to any of the parties. If one belligerent was not a signatory then all parties were released from mandatory compliance. The result was the inhumane treatment of EPW’s in German control.

- H. Geneva Convention Relative to the Treatment of Prisoners of War in 1929. This convention supplemented the 1907 Hague Regulations and expanded safeguards for EPW's. There was no requirement that all parties to the conflict had to be signatories in order for the Convention to apply to signatories.
- I. World War II. Once again, the relevant treaties were not applicable to all parties. The gross maltreatment of EPW's constituted a prominent part of the indictments preferred against Germans and Japanese in the post World War II war crimes trials.
1. The Japanese had signed but not ratified the 1929 Convention. They had reluctantly signed the treaty as a result of international pressure but ultimately refused to ratify it. The humane treatment of EPW's was largely a western concept. During the war, the Japanese were surprised at the concern for EPW's. To many Japanese, surrendering soldiers were traitors to their own countries and a disgrace to the honorable profession of arms.^{xiii} As a result, most EPW's in the hands of the Japanese during World War II were forced to undergo extremely inhumane treatment.
 2. In Europe, the Soviet Union had refused to sign the 1929 Convention and therefore the Germans did not apply it to Soviet EPW's. In Sachsenhausen alone, some 60,000 Soviet EPW's died of hunger, neglect, flogging, torture, and shooting in the winter of 1941-42. The Soviets retained German EPW's in the USSR some twelve years after the close of hostilities.^{xiv} Generally speaking, the regular German army, the Wehrmacht, did not treat American EPW's too badly. The same cannot be said about the treatment Americans experienced at the hands of the German S.S. or S.D.^{xv}
 3. The post-World War II war crimes tribunals determined that the laws regarding the treatment of EPW's had become customary international law by the outset of hostilities. Therefore, individuals were held criminally liable for the mistreatment of EPW's whether or not the perpetrators or victims were from states that had signed the various international agreements dealing with EPW's.^{xvi}
- J. Geneva Convention Relative to the Treatment of Prisoners of War in 1949. The experience of World War II resulted in the expansion and codification of the laws of war in four Geneva Conventions of 1949. With the exception of Common Article III, this Convention only applies to international armed conflict. In such a conflict, signatories must respect the Convention in "all circumstances." This language means that parties must adhere to the

Convention unilaterally, even if not all belligerents are signatories. There are provisions that allow non-signatories to decide to be bound. Moreover, with the exception regarding reprisals, all parties must apply it even if it is not being applied reciprocally. The proper treatment of EPW's has now risen to the level of customary international law.

- K. 1977 Additional Protocols to the 1949 Geneva Conventions. (Protocol I, International Armed Conflicts; Protocol II, Internal Armed Conflicts.) The U.S. is not a party to either Protocol. Neither Protocol creates any new protections for prisoners of war. They do, however, have the effect of expanding the definition of "status," that is, who is entitled to the GPW protections in international armed conflict, and narrowing the coverage of Common Article 3 of the GPW in internal armed conflicts.

II. PRISONER OF WAR STATUS AS A MATTER OF LAW

A. Important Terminology.

1. Prisoners of War (POWs): A detained person as defined in Articles 4 & 5, GPW (FM 27-10, ¶61).
2. Civilian Internees: A civilian who is interned during armed conflict or occupation for security reasons or for protection or because he has committed an offense against the detaining power (Joint Pub 1-02).^{xvii}
3. Retained personnel: Medical and religious personnel retained by the Detaining power with a view toward assisting POWs (Art. 33, GPW).
4. Detainees: A term used to refer to any person captured or otherwise detained by an armed force (Joint Pub 1-02). It includes those persons held during operations other than war (DoDD 2310.1).
5. Refugees: Persons who by reason of real or imagined danger have left home to seek safety elsewhere. *See* Art. 44, GCC and 1951 UN Convention Relating to the Status of Refugees.^{xviii}
6. Dislocated civilian: A generic term that includes a refugee, a displaced person, a stateless person, an evacuee, or a war victim.^{xix}
7. In sum, **always use the term detainee**; it is the broadest term without legal status connotations.

B. In order to achieve the status of a prisoner of war, you have to be the right kind of person in the right kind of conflict. The question of status is enormously important. There are two primary benefits of EPW status. First, you receive immunity for warlike acts (*i.e.*, your acts of killing and breaking things are not criminal). Second, you are entitled to the rights and protections under the GPW. One of those rights is that the prisoner is no longer a lawful target.

C. The Right Kind of Conflict.

1. Common Article 2, GPW: The “Conventions shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties. . . .” (emphasis added).
 - a. Commonly known examples of common Article 2 conflicts include W.W.II, Korea,^{xx} Vietnam,^{xxi} Falklands,^{xxii} Grenada,^{xxiii} Panama,^{xxiv} and the Persian Gulf.^{xxv} The conflict in Bosnia was both an international and internal armed conflict depending on the location and time of the combatant activities. For example, the *Tadic* court determined that the conflict was internal for the purposes of that indictment, but found the conflict to be international for the purposes of the *Celebici* indictment.
 - b. Most legal scholars clearly see NATO’s activities in Kosovo as amounting to international armed conflict. Although the U.S. government initially described the capture of three American soldiers as an unlawful abduction because they were non-combatants, this assertion is questionable.
 - (1) Had they been members of a UN mission, and had the US not been simultaneously bombing Serbia, the US position may have been justified. *See* Convention on the Safety of United Nations and Associated Personnel, G.A. Res. 49/59, 49 U.N. GAOR Supp. (No. 49), at 299, U.N. Doc. A/49/49 (1994).
 - (2) However, the UN mission in Macedonia had ended in February of 1999; they were captured on 31 March 1999. Forces in Macedonia had stopped wearing the traditional UN Blue Helmets; they were now part of the NATO mission. The captives were on a reconnaissance mission, carrying small arms and had a .50 caliber machine gun fixed to their vehicle. The forces in Macedonia were poised for possible ground operations in Kosovo.

- (3) There is nothing in the law of war that requires a party to a conflict to limit its combat activities to the same geographical area that another party has limited its activities to. Even if Macedonia had still been a UN mission, it is arguable that the combatant activities in Kosovo meant that all US forces capable of supporting or reinforcing those activities became legitimate targets. This means that all US forces, no matter where they were located, became potential targets on the 24th of March. If they can be targeted, they can be taken as POW's.
- c. Whether or not a conflict rises to the level of common Article 2 is a question of fact.^{xxvi} Factors one should consider are:
 - (1) Has international recognition of the belligerents occurred?
 - (2) Are there *de facto* hostilities?
 - (3) Has the United States authorized the issuance of wartime awards and pay? (This is not dispositive. Recall: Two Special Operations Forces sergeants received the Congressional Medal of Honor in Somalia, yet it was clearly not an Article 2 conflict!)
 - d. Another factor to consider is whether the combatants are "parties" within the meaning of Article 2. For example, the warlord Aideed and his band in Somalia did not qualify as a "party" for purposes of the Geneva Conventions.
 - e. Protocol I expands the definition of international armed conflict to include conflicts against racist regimes, colonial domination, and alien occupation. Protocol I, Art. 1(4). It is important to understand that the GC's were drafted by military powers with European heritage. Many of the drafters of the Protocols were so-called third world countries with a colonial history. They wanted to insure international law protections, primarily combatant immunity, were extended to their forces.
2. GC Common Article 3. Minimal protections provided. Does not include combatant immunity. Protections limited to internal armed conflicts. Though not defined in the article, armed conflict is something more than mere riots or banditry. There is no absolute test as to what constitutes armed conflict but a significant factor is whether the government uses its armed forces in response to the conflict.

3. Protocol II tends to narrow the scope of CA3. It defines armed conflict whereas the CA3 does not. Unlike CA3, it also requires that to receive the protection of Protocol II, an armed force must be under responsible command and exercise control some territory. Protocol II, Art. 1. This narrowing has the effect of excluding some from the protections of CA3. Again, keeping in mind the drafters' perspective, a newly established state with limited armed forces and resources might be less likely to want to extend protections to revolutionary powers. Some developing nations expressed concern that the super powers of the time (1977), namely, the U.S. and USSR, might, as a subterfuge for intervention, assert that they needed to become involved in the internal conflict to come to the aid of the insurgents pursuant to CA3.
 - a. Protocol II as a minimum standard by analogy?
 - (1) United States is not a party to Protocol II.
 - (2) Unlike Protocol I, it may reflect customary law.
 - (3) Minimum standards at Article 4 (Fundamental Guarantees), Article 5 (Persons Whose Liberty Has Been Restricted), and Article 6 (Penal Prosecutions).
 - b. The problem of Detainees.
 - (1) Haiti.^{xxvii}
 - (2) Somali.^{xxviii}
 - (3) Bosnia-Herzegovina.^{xxix}

D. The Right Kind of Person.

1. Once a conflict rises to the level of common Article 2, Article 4, GPW, determines who is entitled to the status of a prisoner of war. Traditionally, persons were only afforded prisoner of war status if they were members of the regular armed forces involved in an international armed conflict. The GPW also included members of militias or resistance fighters belonging to a party to an international armed conflict if they met the following criteria:
 - a. Being commanded by a person responsible for their subordinates;
 - b. Having fixed distinctive insignia;^{xxx}

- c. Carrying arms openly;^{xxx} and,
 - d. Conducting their operations in accordance with the laws and customs of war.
2. One must recognize that with coalition operations one may have to apply a different standard; our coalition partners may use Protocol I's criteria. Protocol I only requires combatants to carry their arms openly in the attack and to be commanded by a person responsible for the organizations actions, comply with the laws of war, and have an internal discipline system. Art. 43 & 44, PI. Therefore, guerrillas may be covered. Note: The United States is NOT a party to Protocol I, but 147 nations are parties to the treaty.
3. In addition, numerous other persons detained by military personnel are entitled to EPW status if "they have received authorization from the armed forces which they accompany." (i.e., possess a GC identity card from a belligerent government). Specific examples include:
- a. Contractors;
 - b. Reporters;^{xxxii}
 - c. Civilian members of military aircraft crews;
 - d. Merchant marine and civil aviation crews;
 - e. Persons accompanying armed forces (dependents);^{xxxiii} and,
 - f. Mass Levies (Levee en Masse). To qualify these civilians must:
 - (1) Be in non-occupied territory;
 - (2) Act spontaneously to the invasion; and,
 - (3) Carry their arms visibly.^{xxxiv}
 - (4) Contrast this with organized resistance movements.
 - g. This is NOT an all-inclusive list. One's status as a prisoner of war is a question of fact.
 - (1) The possession of a belligerent government issued identification card is weighed heavily.

(2) Prior to 1949, possession of an identification card was a prerequisite to EPW status.^{xxxv}

4. Medical and religious personnel (Retained Personnel) receive the protections of GPW plus (Art. 4C & 33, GPW).
 - a. Retained personnel are to be repatriated as soon as they are no longer needed to care for the prisoners of war.^{xxxvi}
 - b. Of note, retained status is not limited to doctors, nurse, corpsman, etc. It also includes, for example, the hospital clerks, cooks, and maintenance workers.^{xxxvii}
5. Persons whose POW status is debatable:^{xxxviii}
 - a. Deserters/Defectors;^{xxxix}
 - b. Saboteurs;
 - c. Military advisors; and,
 - d. Belligerent diplomats.
6. Persons not entitled to POW status:
 - a. Spies (Art. 29, HR and Art. 46, PI);
 - b. Mercenaries^{xl} (Art. 47, PI); - U.S. disagrees with this view.
7. What is the status of U.N. personnel during peace enforcement operations?^{xli}

E. When an EPW's Status is in Doubt.

1. Policy: Always initially treat as POWs.
2. Law: Article 5, GPW: "Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal."
3. U.S. policy is to convene a three-member panel (FM 27-10, ¶71c). Their role is to ascertain facts, not to adjudicate any type of punishment.

- a. AR 190-8/OPNAVINST 3461.6/AFI 31-304/MCO 3461.1, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, para. 1-6, Tribunals, provides guidance on how to conduct an Article 5 Tribunal.
 - (1) There are to be three voting members, the president of which must be a field grade officer, and one nonvoting recorder, preferably a Judge Advocate.
 - (2) The standard of proof is “preponderance of the evidence.” The regulation does not place the burden of proof or production on either party. The tribunal should not be viewed as adversarial as the recorder need not be a JA and there is no right to representation for the subject whose status is in question.
 - b. If a CINC has his own regulation or policy on how to conduct an Article 5 Tribunal, the CINC’s regulation would control.
4. During Operation Desert Storm we conducted 1,196 Article 5 tribunals.^{xlii}
 - a. What is the JA’s role?^{xliii}
 - b. Who appoints the Article 5 tribunal? AR 190-8 calls for the GCMCA to appoint the tribunals. Remember, a CINC policy can trump AR 190-8.
 5. Recall: Article 5 tribunals are not always necessary.

F. Treatment as a Matter of Policy.

1. GPW is part of the Supreme Law of the Land (Article VI, Constitution of the United States). Thus, its Articles apply unless they are inconsistent with the Constitution itself.
2. DA is Executive Agent for all EPW Matters. DoD Dir. 2310.1 provides: “U.S. Military Services shall comply with the principles, spirit, and intent of the international law of war, both customary and codified, to include the Geneva Conventions.”^{xliv}
3. DoD Dir. 5100.77, Law of War Program, requires all US Forces to comply with the law of war in the conduct of military operations and related activities in armed conflict, however such conflicts are characterized.

4. CJCS 5810.01A, Implementation of the DoD Law of War Program, indicates that the laws of war are to be applied on MOOTW by American forces.
5. Every JA and soldier must understand that **STATUS** is a matter of law. While the United States **TREATS** all persons initially detained consistent with the provisions of the GPW, this is only a policy.^{xlvi}
6. The Phenomenon of Detainees. In operations other than war, the status of a person temporarily detained is frequently at issue. Therefore, our policy is to initially provide the greatest protections this person could receive until our government determines their legal status
 - a. We train our soldiers to always treat captured persons as EPWs. (Doctrine)
 - b. We want our soldiers to receive POW treatment from our adversary. (Reciprocity)
 - c. We may be wrong in our analysis, but one can rarely be criticized for affording persons greater protections than they are otherwise entitled.^{xlvi} (Public perception)

III. PRIMARY PROTECTIONS PROVIDED TO PRISONERS OF WAR

A. Protections, "The Top Ten."

1. Humane Treatment.
2. No medical experiments.
3. Protect from violence, intimidation, insults, and public curiosity.^{xlvi}
4. Equality of treatment.
5. Free maintenance and medical care.
6. Respect for person and honor (female POWs).
7. No Reprisals.
8. No Renunciation of Rights or Status (Art. 7, GPW).
9. The Concept of the Protecting Power.^{xlvi}

10. Immunities for warlike acts, but not for pre-capture criminal offenses (i.e., Noriega), or violations of the law of war.

B. Capture - The 5 S's (Search, Silence, Segregate, Safeguard, Speed to the rear)^{xlix}
[Art. 13, 16, 17, 19, 20 GPW].

1. Who has the authority to detain? (ROE issue?)

- a. Express - mission statement.
- b. Implied - type of mission.
- c. Inherent - self-defense/force protection.

2. When do their treatment rights begin? “. . . [F]rom the time they fall into the power of the enemy . . .”^l (Art. 5, GPW).

3. How do I secure them?

- a. Handcuffs (flexcuffs) and blindfolds.
- b. Shirts pulled down to the elbows.
- c. Protect against public curiosity.

(1) Art. 13 does not per se prohibit photographing an EPW. Photos may not degrade or humiliate an EPW. In addition, balance harm to an EPW and family against news media value. Bottom line: strict guidelines required.^{li}

(2) This is in stark contrast to Iraq and North Vietnam's practice of parading POWs before the news media.

- d. POW capture tags (DA Form 5976).

4. What do I take from an EPW?

- a. Helmet;
- b. Wallet;
- c. Protective clothing;^{lii}
- d. Shoes or shoe laces;

- e. Identity card; and
 - f. Rucksack/luggage.
 - g. Art. 18, GPW allows POWs to **retain** all of the above.^{lii}
 - h. But what about captured persons not entitled to EPW status? *See* Art 97, GCC.^{liv} Does this make sense for security reasons?
 - i. War trophies. It has consistently been the U.S. policy to limit the types and amounts of property taken from the battlefield and retained by the individual soldier. All enemy property captured is the property of the U.S. However, the personal property of EPWs is usually protected from confiscation and seizure.^{lv} Soldiers are not even supposed to barter with EPWs for personal items.^{lvi} However, because of perceived abuses that occurred in not enforcing this policy, Congress legislated two important provisions: 10 U.S.C. §2579^{lvii} and 50 U.S.C. §2201.^{lviii} DoD has yet to implement regulations on the procedures for handling and retaining battlefield objects.
5. Rewards for the capture of EPWs are permissible, but they must avoid even the hint of a “wanted dead or alive” mentality.^{lix}
6. What can I ask a EPW? ANYTHING!!
- a. All POWs are required to give: (Art. 17, GPW)
 - (1) Surname, first name;
 - (2) Rank;
 - (3) Date of birth; and,
 - (4) Serial number.
 - b. What if an EPW refuses to provide his rank? Continue to treat as POW: an E-1 POW.^{lx}
 - c. No torture, threats, coercion in interrogation (Art. 17, GPW). **It’s not what you ask but how you ask it.**^{lxi}
 - (1) What about use of truth serum? No, violates GPW.^{lxii}
 - (2) NK water torture of feet during the winter clearly violated Art. 17.^{lxiii}

(3) Techniques such as placing the EPW at attention during interrogation, planting a cellmate, or concealing a microphone in the POW's cell do not violate Art. 17.^{lxiv}

(4) It may often be difficult to determine where lawful interrogation actions end and unlawful actions begin. Use of a common sense indicator is always helpful. One should ask themselves: if these actions were perpetrated by the enemy against American POWs, would one believe such actions violate international or U.S. law? If the answer is yes, avoid the interrogation techniques.^{lxv}

d. Your U.S. military ID card is your GC card. NOTE: Categories are I to V. What is yours? *See* Art. 60, GPW.

IV. EPW CAMP ADMINISTRATION AND DISCIPLINE^{lxvi}

A. Locations?

1. Land only (Art 22, GPW). However, during the Falklands War the British temporarily housed Argentine EPWs on ship while in transit to repatriation.
2. Not near military targets (Art 23, GPW).^{lxvii} During the Falklands War, several Argentine EPWs were accidentally killed while moving ammunition away from their billets.
3. Responsibility For Camps - a National Responsibility (Art. 10,12 GPW), NOT Religion, ethnic background??^{lxviii} Segregation by these beliefs may be required especially when they are a basis for the conflict.
 - Yugoslavia: Serbs, Croats, and Muslims
 - Rwanda: Hutus, Tutsis
 - Chechnya
4. Political beliefs. Art. 38, GPW, encourages the practice of intellectual pursuit. However, the U.N. experience in EPW camps has demonstrated that pursuit of political beliefs can cause great discipline problems within a camp. In 1952, on Koje-do Island, riots broke out at the EPW camps instigated by N. Koreans EPW communist activists. Scores of prisoners sympathetic to South Korea were murdered by N. Korean EPW extremist groups. During the rioting, EPWs captured the camp commander, Brigadier General Dodd.^{lxix}

B. What Must Be Provided?

1. Quarters equal to Detaining forces (Art. 25, GPW)-(total surface & minimum cubic feet)
2. Adequate clothing considering climate (Art. 27, GPW)
3. Canteen? (Art 28, GPW) Does this make sense?^{lxx}
4. What about Tobacco? Yes (Art. 26, GPW).^{lxxi}
5. Recreation (Art. 38, GPW).
6. Religious accommodation (Art. 34, GPW).
7. Food accommodation (Art. 26 & 34, GPW).
 - pork MREs in Muslim country?
 - use enemy food stocks.
 - let them fix their own food.
8. Copy of GPW in POWs own language. Where do I get a copy in Arabic?

ICRC
 Delegation to the UN
 801 2nd Ave, 18th Fl,
 New York, NY 10017
 (212) 599-6021
 FAX: (212) 599-6009

9. Due process (Art 99 - 108, GPW).
10. Hygiene (Art. 29, GPW).

- cultural aspects
- issues w/ women & children

C. EPW Accountability^{lxxii} (Art. 122 & 123, GPW).

1. Capture notification—PWIS. This system was utilized during Operations Desert Storm and Operation Uphold Democracy.
2. EPW personal property (Art. 16, GWS) (AR 190-8).
3. EPW death (Art. 120 & 121, GPW).

- a. 8 POWs died while under U.S. control during Desert Storm, 3 more died under Saudi control after transfer from U.S. custody.
 - b. Any death or serious injury to a POW requires an official inquiry.
- 4. Reprisals against EPWs are prohibited (Art. 13, GPW).^{lxxiii}
- D. Transfer of POWs (Art. 46 - 48, GPW).
 - 1. Belligerent can only transfer EPWs to nations who are parties to the Convention.
 - 2. Detaining Power remains responsible for POWs care.
 - a. There is no such thing as a “U.N.” or “coalition” EPW!^{lxxiv}
 - b. To ensure compliance with the GPW, U.S. Forces routinely establish liaison teams and conduct GPW training with allied forces prior to transfer EPWs to that nation.^{lxxv}
 - c. Requires Assistant Secretary of Defense for International Security Affairs approval.^{lxxvi}
- E. Complaints and Prisoners’ Representatives (Art 78-81, GPW).
 - 1. Voting for a PR conflicts with Code of Conduct SRO requirement.
 - 2. SRO will take command.
 - 3. EPWs have standing to file a Habeas Corpus action under 28 U.S.C. § 2255 to seek enforcement of their GPW rights.
- F. EPW Labor^{lxxvii} (Art 49 – 57, GPW) (AR 190-8, **READ IT!**).
 - 1. Rank has its privileges.
 - a. Officers: can’t compel them to work.
 - b. NCOs: you can compel them to supervise only.
 - c. Enlisted: you can compel them to do manual labor.
 - d. If they work, you must pay them.
 - e. Retained Personnel.

2. Detainee status.^{lxxviii}
3. Compensation (Art. 60, GPW).^{lxxix} 8 days paid vacation annually? (Art. 53, GPW)
4. Type of Work
 - a. Directly aiding the armed conflict effort? No
 - b. Dangerous work? No, unless they volunteer. SRO volunteers his soldiers to move artillery shells from near the POW camp?
 - c. Work on the camp itself?
 - (1) Building housing.
 - (2) Running concertina wire around their compound (Can you vs. should you?).

G. Camp Discipline.

1. Disciplinary sanctions (Art. 15 type punishment).
 - a. Must relate to breaches of camp discipline.
 - b. Only 4 types of punishments authorized (Art. 88, GPW). Max. punishments are (Art. 90, GPW):^{lxxx}
 - (1) Fine: ½ pay up to 30 days.
 - (2) Withdrawal of privileges, not rights.
 - (3) 2 hours of fatigue duty per day for 30 days.
 - (4) Confinement for 30 days (Art. 87, 89, 90, 97, & 98, GPW).
 - c. Imposed by the camp commander (Art. 96, GPW).
2. Judicial sanctions.
 - a. EPWs pre-capture v. post-capture.
 - (1) Pre-capture: GCM or federal or state court if they have jurisdiction over U.S. soldier for same offense (Art. 82, 85, GPW).^{lxxxi}

(2) Post-capture: any level court-martial UP of Article 2(9), UCMJ (Art. 82, 102).

(3) Court-martial or military commission (Art. 84). [BUT note effect of Art. 102, GPW!]

b. Detainees.

(1) Military Commissions.^{lxxxii}

(2) Local National Court.

c. Due process required.

(1) POWs: same as detaining powers military forces (Art 99 - 108, GPW).

(2) Detainees. What due process they receive depends upon status: GCC, common Art. 3, or minimal human rights protection with Host Nation law.

(3) Right to appeal (Art 106, GPW).

H. Escape.

1. When is an escape successful:^{lxxxiii} (Art. 91, GPW).

a. SM has rejoined his, or Allies', armed forces;

b. SM has left the territory of the Detaining power or its ally (i.e., entered a neutral country's territory).^{lxxxiv}

2. Unsuccessful escape.

a. Only disciplinary punishment for the escape itself (Art. 92, GPW). *See also* Art. 120, GCC.

b. Offenses in furtherance of escape.^{lxxxv}

(1) Disciplinary punishment only: if sole intent is to facilitate escape and no violence to life or limb, or self-enrichment (Art. 93, GPW). For example, a POW may wear civilian clothing during escape attempt without losing his POW status.^{lxxxvi}

(2) Judicial punishment: if violence to life or limb or self-enrichment (Art. 93, GPW).

3. Successful escape: Some authors argue no punishment can be imposed for escape or violence to life or limb offenses committed during escape if later recaptured (Art 91, GPW; Levie). However, most authors posit that judicial punishment can occur if a POW is later recaptured for his previous acts of violence.

- Issue still debated so U.S. policy is not to return successfully escaped POW to same theater of operations (i.e. COL Rowe).

4. Use of force against POWs during an escape attempt or camp rebellion is lawful. Use of deadly force is authorized “only when there is no other means of putting an immediate stop to the attempt.”^{lxxxvii}

I. Repatriation.^{lxxxviii}

1. Sometimes required before cessation of hostilities (Art. 109, GPW).

- a. Seriously sick and wounded POWs whose recovery is expected to take more than 1 year (Art. 110, GPW).
- b. Incurable sick and wounded (Art. 110, GPW).
- c. Permanently disabled physically or mentally (Art. 110, GPW).
- d. Used in Korean War: 6640 NK & Chinese for 684 UN soldiers. Operation Little Switch.
- e. This provision is routinely ignored.

2. After cessation of hostilities.

- a. Must it be done?

(1) Art. 118 provides: “Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.”

(2) Rule followed through W.W.II.

- Result: thousands of Russian POWs executed by Stalin upon forced repatriation.

(3) U.N. command in Korea first established principle that POWs do not have to be repatriated, if they do not so wish.^{lxxxix} Logic supported by Pictet.

(4) The experience in Vietnam.^{xc}

(5) Desert Storm experience.

3. During a cease-fire or Armistice

a. CW2 Hall incident^{xc}

(1) Probable basis for repatriation: Art. 118

(2) Art. 117 provides: “No repatriated person may be employed on active military service.”

- only applies to Art. 109, 110 repatriations.

b. Legally there is no problem going back to duty in S. Korea.^{xcii} But does it make common sense?

V. CODE OF CONDUCT.

A. The Air Force is the Executive Agent.

B. The Joint Services SERE Agency (JSSA) implements the DoD Directive on Code of Conduct matters.

C. History of U.S. POW Misconduct.

1. First American POW “turncoat” occurred in Revolutionary War. Later, he was convicted of treason. *Republica v. M’Carty*, 2 U.S. 86 (1781).

2. U.S. War Dept G.O. 207 (1863) made it the duty of a soldier captured by the Confederates to escape.

- Union soldiers collaborated with Confederates forces in Andersonville to stop tunneling attempts.

3. In WW II, prisoners collaborated. *U.S. v. Provoo*, 124 F. Supp. 185 (S.D.N.Y. 1954), *rev’d*, 215 F. Supp. 531 (2d Cir. 1954) (mistreatment of fellow POWs and making radio broadcasts for Japanese).

4. During the Korean War, a conservative estimate is 30% of U.S. personnel collaborated to some degree with the enemy.^{xciii}
 5. President Eisenhower issued E.O. 10631 creating the modern day concept of the Code of Conduct in response to Korean War POW conduct.
 6. Between 1955 and 1979 DoD issued guidance on the Code of Conduct five times.^{xciv}
 7. Most recent change did not substantively change the Code of Conduct. It only made the Code gender neutral. (See E.O. 12633).
- D. Code of Conduct Applies Regardless of Service member's "Status" (i.e., MOOTW).^{xcv}
- E. POW Statements: Do they Violate the Code?
1. *USS PUEBLO* crew detained after being seized in international waters (physical torture)? No Code violation.
 2. Did LT Zaun violate the Code of Conduct?^{xcvi} No
 3. Did WO Hall violate the Code of Conduct?^{xcvii}
 - a. Official U.S. position: No
 - b. Why not? (No physical coercion).
 4. Key words are "resist" and to the "utmost of my ability."
 5. Does a POW violate the Code if he writes a letter to his family? No. It's not in response to questioning.
 6. "Confessions" to war crimes may result in loss of POW status if later tried. See reservations to Art. 85, GPW in Pictet, at 423 - 427.
- F. Is Art. III of the Code of Conduct inconsistent with POW status?^{xcviii}
1. No, even during escape attempt, once POW is outside detaining powers immediate control, POW retains status but detaining power can use all necessary means to prevent his successful escape, including deadly force (Art. 5 & 42, GPW).

2. Retained personnel exception: the requirement to escape does not apply to doctors/chaplains.
3. SRO can authorize temporary parole to perform acts which will materially contribute to the welfare of the prisoner or fellow prisoner (FM 27-10, para. 187b).

G. Can It Be Punitive?

1. Moral code, not a legal code.^{xcix}
2. But can be punitive by analogy under the UCMJ.
 - a. Disrespect/Disobey SRO;
 - b. Aiding the enemy;
 - c. Mutiny and sedition;
 - d. Cruelty and maltreatment; and,
 - e. Misconduct as a prisoner.^c
3. 14 former POWs were court-martialed after Korea.^{ci}
4. Attempts were made after Vietnam to prosecute POWs but for “policy” reasons this did not occur.^{cii} Note the Garwood exception.

H. Code of Conduct Training as part of LOW Training.

“The most consistent unsolicited statement made by Southeast Asia Prisoners of War concern the need for improved and uniform training so that future prisoners would all be working together from the same and the best ground rules.”^{ciii}

1. Should JAs be teaching this? Why not, if no SERE program.
 - a. JAs are no less qualified than any other non-SERE graduate.
 - b. JAs can combine and distinguish between the legal and moral obligations.
 - c. Code of Conduct instruction meshes well with other POW classes we already teach.
2. **“John Wayne doesn’t appear at POW camps.”^{civ}**

3. Bounce back theory (developed by a SRO while in the “Hanoi Hilton”).
 - a. Resist as long as possible. The factors that effect a POWs ability to resist are:
 - (1) Shock of captivity;
 - (2) Wounds or illness;
 - (3) Malnutrition; and,
 - (4) Exploitation by captors. For example, the North Vietnamese prison guards would tell U.S. POWs of their obligations under the Code of Conduct.^{cv}
 - (5) Disease used as a means to influence.
 - b. If broken, give as little as possible. COL Rowe identifies three levels of information:
 - (1) Information they already possess or could easily acquire from other readily available sources.
 - (2) Information whose value diminishes over time (perishable).
 - (3) Information where you “bite the bullet.”^{cvi}
 - (4) “I don’t know” is the hardest answer for an interrogator to break.
 - (5) Humor is the greatest weapon - Americans laugh when they get hurt.
 - c. Regroup and begin to resist again.
 - d. Don’t be overwhelmed with guilt.
4. SERE: COL Nick Rowe experience.
5. SRO is the commander regardless of service branch.^{cvi}
6. By E.O. 12018, Retained Personnel cannot be SROs. Being an SRO would be inconsistent with their retained status.
7. Box 25 - used by Vietnam POWs (modified Morse Code).^{cvi}

A	B	C	D	E
F	G	H	I	J
L	M	N	O	P
Q	R	S	T	U
V	W	X	Y	Z

VI. CONCLUSION

ⁱ See WILLIAM FLORY, PRISONERS OF WAR: A STUDY IN THE DEVELOPMENT OF INTERNATIONAL LAW (1942), for a more detailed account of prisoner of war treatment through antiquity.

ⁱⁱ COMMENTARY, III GENEVA CONVENTION, INTERNATIONAL COMMITTEE OF THE RED CROSS 4 (1960).

ⁱⁱⁱ Probably the most famous medieval prisoner of war was England's Richard I of Robin Hood fame. King Richard's ship sank in the Adriatic Sea during his return from the Third Crusade in 1192. While crossing Europe in disguise, he was captured by Leopold, Duke of Austria. Leopold and his ally the Holy Roman Emperor, Henry VI, entered into a treaty with Richard on St. Valentine's Day, 1193, whereby England would pay them £100,000 in exchange for their king. This amount then equaled England's revenues for five years. The sum was ultimately paid under the watchful eye of Richard's mother, Eleanor of Aquitaine, and he returned to English soil on March 13, 1194. See M. Foster Farley, *Prisoners for Profit: Medieval intrigue quite often focused upon hopes of rich ransom*, MIL. HISTORY (Apr. 1989), at 12.

Richard's confinement by Leopold did seem to ingrain some compassion for future prisoners of war he captured. Richard captured 15 French knights in 1198. He ordered all the knights blinded but one. Richard spared this knight one eye so he could lead his companions back to the French army. This was considered an act of clemency at the time. MAJOR PAT REID, PRISONER OF WAR (1984).

^{iv} See generally, Rev. Robert F. Grady, *The Evolution of Ethical and Legal Concern for the Prisoner of War*, Sacred Studies in Sacred Theology N. 218, The Catholic University of America. (On file with the TJAGSA library)

^v John C. Miller, TRIUMPH OF FREEDOM (1948), Rev. R. Livesay, THE PRISONERS OF 1776; A RELIC OF THE REVOLUTION COMPILED FROM THE JOURNAL OF CHARLES HERBERT (1854), Sydney George Fisher, THE STRUGGLE FOR AMERICAN INDEPENDENCE (1908).

^{vi} Accord, Levie, at 5. See Levie, DOCUMENTS ON PRISONERS OF WAR, at 8, for the text of this treaty.

^{vii} See Levie, DOCUMENTS ON PRISONERS OF WAR, at 39. For a summary of who Doctor Francis Lieber was and the evolution of the Lieber Code, see George B. Davis, *Doctor Francis Lieber's Instructions for the Government of Armies in the Field*, 1 AM. J. INT'L L. 13 (1907).

^{viii} VOL. V, THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES at 807-808 (Gov. Printing Office 1880-1901).

^{ix} Rev. J. William Jones, CONFEDERATE VIEW OF THE TREATMENT OF PRISONERS (1876).

^x Over one-half of the Northern P.O.W.s died at Andersonville. See Lewis Lask and James Smith, *'Hell and the Devil': Andersonville and the Trial of Captain Henry Wirz*, C.S.A., 1865, 68 MIL. L. REV. 77 (1975). See also U.S. Sanitary Commission, Narrative of Privations and Sufferings of United States Officers and Soldiers while Prisoners of War in the Hands of the Rebel Authorities, S.

RPT. NO. 68, 40th CONG., 3RD SESS. (1864), for a description of conditions suffered by POWs during the civil war. Flory, *supra*, at 19, n. 60 also cites the Confederate States of America, *Report of the Joint Select Committee Appointed to Investigate the Condition and Treatment of Prisoners of War* (1865).

^{xi} COMMENTARY, *supra* note 2.

^{xii} G.I.A.D. Draper, THE RED CROSS CONVENTIONS 11 (1958).

^{xiii} Grady, *supra* note 4 at 103.

^{xiv} Draper, *supra* note 12 at 49.

^{xv} Grady, *supra* note 4 at 126.

^{xvi} *Id.*

^{xvii} DEP'T OF DEF., JOINT PUBLICATION 1 (1 June 1987). *See also* Section IV, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949 (reprinted in DA PAM. 27-1)[hereinafter GCC] and the Protections of Civilians in Armed Conflict chapter of this text.

^{xviii} 189 U.N.T.S. 137.

^{xix} *See* DEP'T OF THE ARMY, FIELD MANUAL 41-10, CIVIL AFFAIRS (11 January 1993).

^{xx} While few people argue whether or not the Korean War was a common Article 2 conflict, there was a question of whether the 1949 Geneva Conventions would apply. The United States did not ratify the Conventions until 1955. However, by July 1950, the United States, South Korea, and North Korea all agreed to be bound its terms. *See The Geneva Conventions in the Korean Hostilities*, DEP'T OF STATE BULLETIN, vol. 33, at 69 - 73 (1955). Unfortunately, in practice, North Korea routinely abused and killed POWs in violation of the agreement and the terms of the 1949 Conventions. For a discussion of mistreatment prisoners of war have faced in general at the hands of communist captives, *see* SEN. SUBCOMM. TO INVESTIGATE THE ADMIN. OF THE INTERNAL SECURITY ACT AND OTHER INTERNAL SECURITY LAWS OF THE COMM. ON THE JUDICIARY, 92ND CONG., 2D SESS., COMMUNIST TREATMENT OF PRISONERS OF WAR: A HISTORICAL SURVEY (Comm. Print 1972).

^{xxi} *See* THE VIETNAM WAR AND INTERNATIONAL LAW (R. Falk, ed. 1968), and LAW AND RESPONSIBILITY IN WARFARE: THE VIETNAM EXPERIENCE (P. Trooboff, ed. 1975).

^{xxii} *See* James F. Gravelle, *The Falkland (Malvinas) Islands: An International Law Analysis of the Dispute Between Argentina and Great Britain*, 107 MIL. L. REV. 5 (1985), and Sylvie-Stoyanka Junod, PROTECTION OF THE VICTIMS OF THE ARMED CONFLICT FALKLAND-MALVINAS ISLANDS (1982), (ICRC, 1984).

^{xxiii} *See* Memorandum, HQDA, DAJA-IA, subject: Geneva Conventions Status of Enemy Personnel Captured During URGENT FURY (4 Nov. 1983). *See also* John Norton Moore, LAW AND THE GRENADA MISSION (1984).

^{xxiv} Initially, the U.S. official position was Panama was not an Article 2 conflict. *See* APPENDIX B. A primary argument was the legitimate Government of Panama invited us to assist them in reestablishing control of Panama after General Noriega nullified the free elections where Mr. Endara was elected President. To support this position, concurrent with the invasion, Mr. Endara was sworn in as President of Panama in the U.S. Southern Command Headquarters one hour before the invasion occurred; forces were already airborne en route. *See* General Accounting Office, Panama: Issues Relating to the U.S. Invasion 4, n.2 (April 1991)[GAO/NSIAD-91-174FS]. *See generally*, Bob Woodward, THE COMMANDERS 84, 182 (1991). *See also* Thomas Donnelly, Margaret Roth, and Caleb Baker, OPERATIONS JUST CAUSE: THE STORMING OF PANAMA (1991), for details of the invasion.

After General Noriega's capture, he petitioned a federal court claiming POW status under the Geneva Conventions. While the U.S. argued General Noriega would be treated consistent with the Convention, they would not agree that he was, in fact, entitled to POW status. However, in *United States v. Noriega*, 808 F. Supp. 791 (S.D. Fla. 1992), a district court judge found Panama was an article 2 conflict as a matter of law and granted POW status to the General. Noriega was ultimately tried, convicted, and sentenced in 1992 to 40 years on drug and racketeering charges. *See generally*, Laurens Grant, *Panama outraged by Noriega's TV appearance*, REUTERS, Apr. 26, 1996, available in LEXIS, News Library, CURNWS File and Larry King, *Noriega pleads case for release*, USA TODAY, Apr. 22, 1996 at 2D.

See generally, John Parkerson, *United States Compliance with Humanitarian Law Respecting Civilians During Operation Just Cause*, 133 MIL. L. REV. 31 (1991).

^{xxv} *See* BARRY E. CARTER AND PHILLIP R. TRIMBLE, INTERNATIONAL LAW: SELECTED DOCUMENTS 880 - 908 (1995)[hereinafter Carter and Trimble], for copies of the United Nations Security Council Resolutions and U.S. domestic documents authorizing the coalition's actions. *See generally*, DEP'T OF DEF., FINAL REPORT TO CONGRESS: CONDUCT OF THE PERSIAN GULF WAR (1992)[hereinafter DOD PERSIAN GULF REPORT], attached as APPENDIX A, and U.S. NEW AND WORLD REPORT STAFF, TRIUMPH WITHOUT VICTORY: THE UNREPORTED HISTORY OF THE PERSIAN GULF WAR (1992).

^{xxvi} According to Pictet:

Any difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, how much slaughter takes place, or how numerous are the participating forces; it suffices for the armed forces of one Power to have captured adversaries falling within the scope of Article 4. Pictet, at 23.

^{xxvii} *See* Larry Rohter, *Legal Vacuum in Haiti is Testing U.S. Policy*, N.Y. TIMES, Nov. 4, 1994, at A32. *See ALSO* LAW AND MILITARY OPERATIONS IN HAITI, 1994-1995: LESSONS LEARNED FOR JUDGE ADVOCATES, 59 - 72, and App. R (11 Dec. 95)[hereinafter Haiti AAR].

^{xxviii} *See* Memorandum, CDR, Unified Task Force Somalia, to All Subordinate Unified Task Force Commanders, subj: Detainee Policy (9 Feb. 93).

^{xxix} *See* Office of the Legal Counsel to Chairman, Joint Chiefs of Staff, Information Paper, subj: Legal status of aircrews flying in support of UNPROFOR (2 June 1995); Message, Joint Staff/SECSTATE, subj: POW Status of NATO Aircrews in Bosnia (200343Z Feb 94).

^{xxx} For a discussion of the uniform requirement, *see In re Quirin*, 317 U.S. 1 (1942) and *Mohamadali and Another v. Public Prosecutor* (Privy Council, 28 July 1968), 42 I.L.R. 458 (1971). The first attempt to codify the uniform requirement necessary to receive POW status occurred during the Brussels Conference of 1874.

^{xxxi} This term carrying arms openly does NOT require they be carried visibly. However, the requirement rests upon the ability to recognize a combatant as just that. Protocol I changes this requirement in a significant way. Under the 1949 Convention, a combatant is required to distinguish himself throughout military operations. Art. 44(3), PI, only obligates a combatant to distinguish himself from the civilian population "while they are engaged in an attack or in a military operation preparatory to an attack, or in any action carried out with a view to combat." COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 527 (Y. Sandoz, C. Swinarski, and B. Zimmerman, eds. 1987).

^{xxxii} See Hans-Peter Gasser, *The Protection of Journalists Engaged in Dangerous Professional Missions*, INT'L REV. RED CROSS (Jan/Feb. 1983), at 3. See also KATE WEBB, *ON THE OTHER SIDE* (1972) (journalist held for 23 days in Cambodia by the Viet Cong).

^{xxxiii} See Stephen Sarnoski, *The Status Under International Law of Civilian Persons Serving with or Accompanying Armed Forces in the Field*, ARMY LAW. (July 1994), at 29. See generally, MEMORANDUM FOR THE ASSISTANT JUDGE ADVOCATE GENERAL (CIVIL LAW), SUBJ: Civilians in Desert Shield -- INFORMATION MEMORANDUM (26 Nov. 1992).

^{xxxiv} See Pictet, at 67.

FM 27-10, ¶ 65 says all males of military ages may be held as POWs. The GPW does not discriminate the right to detain by gender and therefore females may be detained as well.

^{xxxv} See Article 81, Geneva Convention Relative to the Treatment of Prisoners of War of July 27, 1929, *reprinted in*, Pictet, at 683. See also DEP'T OF DEF., INST. 1000.1, IDENTITY CARDS REQUIRED BY THE GENEVA CONVENTION (30 January 1974).

^{xxxvi} This is one of the most abused provisions of the Geneva Conventions. The last time this author knows of this occurring was by the United States during World War I. During hostilities we repatriated 59 medical officers, 1,783 sanitary personnel, including 333 members of the German Red Cross. FINAL REPORT OF GENERAL JOHN J. PERSHING HQ, AEF Sept. 1, 1919, *reprinted in* XVI THE STORY OF THE GREAT WAR (1920), at App., p. lvii.

^{xxxvii} See I INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY TO THE GENEVA CONVENTION FOR AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 218 - 258 (Pictet ed. 1952)(Articles 24 - 28). See generally, ALMA BACCINO-ASTRADA, MANUAL ON THE RIGHTS AND DUTIES OF MEDICAL PERSONNEL IN ARMED CONFLICTS (ICRC, 1982) and Liselotte B. Watson, *Status of Medical and Religious Personnel in International Law*, JAG J. 41 (Sep-Oct-Nov 1965).

^{xxxviii} See Levie, at 82 - 84; Richard R. Baxter, *So-Called 'Un privileged Belligerency': Spies, Guerrillas, and Saboteurs*, MIL. L. REV. BICENTENNIAL ISSUE 487 (1975)(Special Ed.); Albert J. Esgain and Waldemar A. Solf, *The 1949 Geneva Convention Relative to the Treatment of Prisoners of War: Its Principles, Innovations, and Deficiencies*, MIL. L. REV. BICENTENNIAL ISSUE 303 (1975)(Special Ed.).

^{xxxix} See Memorandum, HQDA, DAJA-IA, 22 January 1991, SUBJECT: Distinction Between Defectors/Deserters and Enemy Prisoners of War. See also Levie, at 77 - 78; James D. Clause, *The Status of Deserters Under the 1949 Geneva Prisoner of War Convention*, 11 MIL. L. REV. 15 (1961); and, L.B. Schapior, *Repatriation of Deserters*, 29 BRIT. YB. INT'L L. 310 (1952).

^{xl} See John R. Cotton, *The Rights of Mercenaries as Prisoners of War*, 77 MIL. L. REV. 144 (1977).

^{xli} See Convention on the Safety of United Nations and Associated Personnel, G.A. Res. 49/59, 49 U.N. GAOR Supp. (No. 49), at 299, U.N. Doc. A/49/49 (1994).

^{xlii} DOD PERSIAN GULF REPORT, at 578.

^{xliii} See, e.g., U.S. CENTRAL COMMAND, REGULATION 27-13, LEGAL SERVICES - CAPTURED PERSON: DETERMINATION OF ELIGIBILITY FOR ENEMY PRISONER OF WAR STATUS (7 Feb. 95), for guidance about, and procedures for, actually conducting, Article 5 tribunals.

^{xliv} Note, the DoD Directive refers to the Geneva Conventions, not simply the one relating to EPWs. This supports the use of the GCC when more appropriate than the GPW: certain detainees. For a thorough analysis of the rights afforded civilians along the operational continuum, see Richard M. Whitaker, *Civilian Protection Law in Military Operations: An Essay*, ARMY LAW. (Nov. 1996), at 3.

^{xl} See also Art. 4 & 27, GCC.

^{xlvi} See generally, *U.S. v. Noriega*, 808 F. Supp. 791 (S.D. Fla. 1992). Of note, the U.S. chose not to appeal the decision.

^{xlvii} Trial of Lieutenant General Kurt Maelzer, Case No. 63, *reprinted in* UNITED NATIONS WAR CRIMES COMMISSION, XI LAW REPORTS OF TRIALS OF WAR CRIMINALS 53 (1949)(parading of American prisoners of war through the streets of Rome). See Gordon Risius and Michael A. Meyer, *The protection of prisoners of war against insults and public curiosity*, INT'L REV. RED CROSS, No. 295, (July/Aug. 1993), at 288. This article focuses on the issue of photographing prisoners of war.

^{xlviii} See Levie, at 262.

^{xlix} DEP'T OF ARMY, FIELD MANUAL 19-40, ENEMY PRISONERS OF WAR, CIVILIAN INTERNEES AND DETAINED PERSON (Feb. 1976), at ¶2-4. An important component of the 5Ss often neglected is speed to the rear. EPWs can be on the move for days before they reach their final camp. According to FM 19-40, the echelon having custody of the EPW has responsibility to provide the prisoner sufficient rations during the move. *Id.*, at ¶2-9.

See John L. Della Jacono, *Desert Storm Team EPW*, MILITARY POLICE (June 1992), at 7, for a discussion of MP EPW operations during Operation Desert Storm.

ⁱ During Desert Storm some Iraqi Commanders complained that the Coalition forces did not fight "fair" because our forces engaged them at such distances and with such overwhelming force that they did not have an opportunity to surrender. Additionally, some complained that they were merely moving into position to surrender. However, the burden is upon the surrendering party make his intentions clear, unambiguous, and unequivocal to the capturing unit.

In the case of *United States v. Griffen*, 39 C.M.R. 586 (A.B.R. 1968), *pet. denied*, 39 C.M.R. 293 (C.M.A. 1968), a general court-martial convicted an Army staff sergeant of murder for killing a Vietnamese prisoner of war on the order of his platoon leader.

^{li} See DEP'T OF DEF., FINAL REPORT TO CONGRESS: CONDUCT OF THE PERSIAN GULF WAR (April 1992), at 618. DEP'T OF ARMY, REGULATION 190-8, ENEMY PRISONERS OF WAR ADMINISTRATION, EMPLOYMENT, AND COMPENSATION ¶ 2-15 (2 Dec 85) provides:

- a. EPW will not be photographed except in support of medical documentation, for official identification, or for other purposes described in this regulation.
- b. Interviews of EPW by news media will not be permitted. For purposes of this regulation the term "interview" includes any medium whereby prisoners release information or statements for general publication. It includes, but is not limited to, the taking of still or motion pictures concerning EPW for release to the general public, and telephone, radio, or television interviews or appearances, or mailing material apparently for distribution to the general public.

^{lii} Ltr, HQDA, DAJA-IA 1987/8009, subj: Protective Clothing and Equipment for EPWs.

^{liii} See also, Pictet, at 166, n. 2.

^{liv} Art. 97 essentially allows the military to seize, but not confiscate, personal property of those civilians protected by the Fourth Convention. The difference is important. Confiscate means to take permanently. Seizing property is a temporary taking. Property seized must be receipted for and returned to the owner after the military necessity of its use has ended. If the property cannot be returned for whatever reason, the seizing force must compensate the true owner of the property. See Chapter 9, OPLAW HANDBOOK (2000) and Elyce K.K. Santerre, *From Confiscation to Contingency Contracting: Property Acquisition on or Near the Battlefield*, 124 MIL L. REV. 111 (1989), for a more detailed discussion of the distinction between, requisition, seizure, and confiscation of private property and when it is lawful to do so.

^{lv} See Levie, at 110 - 118.

^{lvi} FM 27-10, ¶94b.

^{lvii} Despite the Congressional requirement in 1994 for DoD to establish regulations for handling war trophies within 270 days of the statute's enactment, DoD has yet to provide any DoD level guidance on how to handle these objects.

^{lviii} Commonly called The Spoils of War Act of 1994, it limits the transfer of captured enemy movable property to the same procedures applicable to the similar military property. (i.e., Arms Export Control Act). It excludes "minor articles of personal property which have lawfully become the property of individual members of the armed forces as war trophies pursuant to public written authorization from the Department of Defense." 50 U.S.C. § 2205. The obvious intent was to exempt war trophies as outlined in 10 U.S.C. § 2579. However, the legislation is poorly written. Art. 18, GPW prohibits this. Only enemy public property may be seized. Enemy public property frequently includes property of a soldier used for his personal use (i.e. TA-50, a weapon). That type of property is different than a soldier's personal property.

^{lix} The U.S. issued an offer of reward for information leading to the apprehension of General Noreiga. Memorandum For Record, Dep't of Army, Office of the Judge Advocate General, DAJA-IA, subj: Panama Operations: Offer of Reward (20 Dec. 1989). This is distinct from a wanted "dead or alive" type award offer prohibited by the Hague Regulations. See FM 27-10, ¶31 (interpreting HR, art. 23b to prohibit "putting a price upon an enemy's head, as well as offering a reward for an enemy 'dead or alive.'").

^{lx} GPW, art. 17, para. 2. See also Pictet, at 158 - 9.

^{lxi} 15 UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS 101 n. 4 (1949) See Stanley J. Glod and Lawrence J. Smith, *Interrogation Under the 1949 Prisoners of War Convention*, 21 Mil. L. Rev. 145 (1963); III COMMENTARY, *supra*, at 163 - 4; Levie, at 106 - 109.

There may be tensions between the military police and the military intelligence communities in this area, especially in operations other than war. The Army has charged the military police branch with responsibility for administering EPWs and Civilian Internees. See Chapter 1, AR 190-8; DEP'T OF THE ARMY, REGULATION 190-57, MILITARY POLICE: CIVILIAN INTERNEE - ADMINISTRATION, EMPLOYMENT, AND COMPENSATION (4 Mar. 1987); and FM 19-40. Military Police units use these regulations as their guide in MOOTW. Both regulations prohibit any physical or moral coercion. See AR 190-47, para. 1-5; AR 190-8, para. 1-5d. See also FM 19-40, para. 1-13d. However, prisoners of war provide a prime resource of intelligence information. See DoD PERSIAN GULF REPORT, at 585 - 586, and Haiti AAR, at 53 - 56. Consequently, military intelligence personnel use various interview techniques to acquire information. See, e.g., DEP'T OF THE ARMY, FIELD MANUAL 34-52, INTELLIGENCE: INTERROGATION (28 Sept. 1992). These techniques may appear to be inconsistent with military police guidance. The judge advocate should become involved to ensure the interrogations comply with a detainee's rights, yet affords the intelligence officer the latitude to utilize interrogation techniques authorized under the applicable law.

U.S. P.O.W.s have routinely been subjected to torture by their captors. In the Persian Gulf War, all 23 American P.O.W.s were tortured. In one technique called the "talkman," a device was wrapped around the prisoner's head and then attached to a car battery. See Melissa Healy, *Pentagon Details Abuse of American POWs in Iraq; Gulf War: Broken Bones, Torture, Sexual Threats are reported. It could spur further calls for War Crimes Trials*, L.A. TIMES, Aug. 2, 1991, at A1. See also Nora Zimchow, *Ex-POW's Tail of a Nightmare; Marine Flier Guy Hunter Endured 46 Days of*

Physical and Psychological Torture in Iraqi Hands. He finally made a videotape denouncing the war, believing he might not live, L.A. TIMES, Mar. 31, 1991, at A1. The Iraqis did not limit their mistreatment to only U.S. prisoners. *See Iraqi torturers failed to crack SAS soldier's cover story*, THE HERALD (Glasgow), Oct. 13, 1993, at 9, available in LEXIS, Nexis Library, ARCNWS file.

For a description of the interrogation techniques used by the communists during the Korean War, *see* S. RPT. NO. 2832, COMMUNIST INTERROGATION OF AMERICAN PRISONERS, 84th Cong., 2d Sess. (1957); S. COMM. ON GOV'T OP., COMMUNIST INTERROGATION, INDOCTRINATION, AND EXPLOITATION OF AMERICAN MILITARY AND CIVILIAN PRISONERS, 83rd Cong., 2d Sess. (1956).

^{lxii} *See* OTJAG opinion: JAGW 1961/1157, 21 June 1961.

^{lxiii} *See* Ministry of Defence, United Kingdom, *Treatment of British Prisoners of War in Korea* (HMSO, 1955), reprinted in, Levie, DOCUMENTS ON PRISONERS OF WAR, at 651, 662. This article provides a compelling account of the inhumane treatment provided U.N. P.O.W.s generally during the Korean War.

^{lxiv} *See* DEP'T OF ARMY, FIELD MANUAL 34-52, INTELLIGENCE INTERROGATION 3-11 (28 Sept. 92) and Glod and Smith, *supra*, at 155.

^{lxv} *See* FM 34-52, *supra*, at 1-9.

^{lxvi} For a historical recount of some of the most horrific treatment of conditions faced by P.O.W.s in any war, *see* GAVAN DAWES, PRISONERS OF THE JAPANESE: POWS OF WORLD WAR II IN THE PACIFIC (1994). Compare conditions U.S. P.O.W.s have historically suffered with the treatment U.S. forces have historically afforded their prisoners. *See, e.g.*, Jack Fincher, *By Convention, the enemy within never did without*, SMITHSONIAN (June 1995), at 126 (an account of U.S. treatment of German P.O.W.s during World War II) and Gary Marx, *Panama prison camp no Stalag 17*, CHI. TRIB., Jan. 8, 1990.

^{lxvii} Iraq used U.S. and allied P.O.W.s during the Persian Gulf War as human shields in violation of Art. 19 & 23, GPW. *See Iraqi Mistreatment of POWs*, DEP'T OF STATE DISPATCH, Jan. 28, 1991, at 56 (Remarks by State Department Spokesman Margaret Tutwiler). *See also* DEP'T OF DEF., FINAL REPORT TO CONGRESS: CONDUCT OF THE PERSIAN GULF WAR (April 1992), at 619 - 620.

^{lxviii} Art. 34, GPW. One of the most tragic events of religious discrimination by a detaining power for religious reasons was the segregation by the Nazis of Jewish American Prisoners of War. Several Jewish American soldiers were segregated from their fellow Americans and sent to slave labor camps where "they were beaten, starved and many literally worked to death." MITCHELL G. BARD, FORGOTTEN VICTIMS: THE ABANDONMENT OF AMERICANS IN HITLER'S CAMPS (1994). *See also* Trial of Tanaka Chuichi and Two Others in UNITED NATIONS WAR CRIMES COMMISSION, XI LAW REPORTS OF WAR CRIMES TRIALS 62 (1949) (convicting Japanese prison guards, in part, for intentionally violating the religious practices of Indians of the Sikh faith).

^{lxix} DEP'T OF THE ARMY, OFFICE OF THE PROVOST MARSHALL, REPORT OF THE MILITARY POLICE BOARD NO. 53-4, COLLECTION AND DOCUMENTATION OF MATERIAL RELATING TO THE PRISONER OF WAR INTERNMENT PROGRAM IN KOREA, 1950-1953 (1954). *See also* WALTER G. HERMES, TRUCE TENT AND FIGHTING FRONT (1966), at 232-63; *The Communists War in POW Camps*, Dep't of State Bulletin, Feb 6, 1953, at 273; Harry P. Ball, *Prisoner and War Negotiations: The Korean Experience and Lesson*, in 62 INTERNATIONAL LAW STUDIES: THE USE OF FORCE, HUMAN RIGHTS AND GENERAL INTERNATIONAL LEGAL ISSUES, VOL. II, 292- 322 (Lillich & Moore, eds., 1980).

^{lxx} The U.S. does not provide EPWs with a canteen, but instead provides each EPW with a health and comfort pack. Memorandum, HQDA-IP, 29 Oct. 94, subj: Enemy Prisoner of War Health and Comfort Pack.

^{lxxi} See Memorandum, HQDA-IO, 12 Sept. 94, subj: Tobacco Products for Enemy Prisoners of War. During Desert Storm, the 301st Military Police EPW camp required 3500 packages of cigarettes per day. *Operation Deserts Storm: 301st Military Police EPW Camp Briefing Slides*, available in TJAGSA, ADIO POW files. See also WILLIAM G. PAGONIS, MOVING MOUNTAINS: LESSONS IN LEADERSHIP AND LOGISTICS FROM THE GULF WAR 10 (1992), for LTG Pagonis' views about being told he must buy tobacco for EPWs.

^{lxxii} See Vaughn A. Ary, *Accounting for Prisoners of War: A Legal Review of the United States Armed Forces Identification and Reporting Procedures*, ARMY LAW., August 1994, at 16, for an excellent review of the United States system of tracking EPWs. See also Robert G. Koval, *The National Prisoner-of-War Information Center*, MILITARY POLICE (June 1992), at 25.

^{lxxiii} In Vietnam, by 1965 scores of U.S. servicemen had become prisoners of war. We argued for full protections under the GPW as by mid-1965 the hostilities had risen to the level of an armed conflict. See *Letter from the ICRC to the Secretary of State dated 11 June 1965*, 4 I.L.M. 1171 (1965); *U.S. Continues to Abide by Geneva Conventions of 1949 in Viet Nam*, DEP'T OF STATE BULLETIN, Sept. 13, 1965, p. 3. N. Vietnam argued that they were committing "acts of piracy and regard the pilots who have carried out pirate raids . . . as major criminals. . . ." *Hanoi said to Hint Trial of Americans*, N.Y. TIMES, Feb. 12, 1966, at A12. See also *Hearings on American Prisoners of War in Southeast Asia 1971 before the Subcomm. on National Security Policy and Scientific Developments of the House Comm. on Foreign Affairs*, 92d Cong., 1st Sess., at 448 - 49 (1971).

To complicate matters, the U.S. initially transferred captured Viet Cong to South Vietnam. South Vietnam considered the V.C. insurgents subject solely to their domestic law, and routinely denied EPW status to them. Shortly after the trial and execution of several Viet Cong by the South Vietnamese government, North Vietnam retaliated by executing Captain Humbert R. (Rocky) Versace and Sergeant Kenneth Roarback in September 1965. See Neil Sheehan, *Reds' Execution of 2 Americans Assailed by U.S.*, N.Y. TIMES, Sept. 28, 1965, at A1. Shortly thereafter, the U.S. policy towards the Viet Cong changed. U.S. policy became, V.C. captured "on the field of battle" would be afforded POW status. See U.S. MILITARY ASSISTANCE COMMAND, VIETNAM, DIRECTIVE 381-11, *Exploitation of Human Sources and Captured Documents*, 5 August 1968. See also THE HISTORY OF MANAGEMENT OF POWS: A SYNOPSIS OF THE 1968 US ARMY PROVOST MARSHAL GENERAL'S STUDY ENTITLED "A REVIEW OF UNITED STATES POLICY ON TREATMENT OF PRISONERS OF WAR" (1975), at 49 - 55. Captain Versace was from Madison, Wisconsin and graduated from West Point in 1959. See UNITED STATES MILITARY ACADEMY, THE 1959 HOWITZER 473 (1959)(includes a picture of Captain Versace).

Acts of reprisals have not always been prohibited. In fact, during the Civil War, the War Department issued General Order 252 of 1863 whereby President Lincoln ordered that "for every soldier of the United States killed in violation of the laws of war, a rebel soldier shall be executed; and for every one enslaved by the enemy or sold into slavery . . . a rebel soldier shall be placed at hard labor on the public works, and continued at such labor until the other shall be released and receive treatment due to a prisoner of war. WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 796 (2d ed. 1920).

^{lxxiv} See Albert Esgain and Waldemar Solf, *The 1949 Geneva Convention Relative to the Treatment of Prisoners of War: Its Principles, Innovations, and Deficiencies*, MIL. L. REV. BICENT. ISSUE 303, 328-330 (1975), for a discussion of the practical problems faced with this provision.

^{lxxv} See, e.g., Memorandum of Agreement Between the United States of America and the Republic of Korea on the Transfer of Prisoners of War/Civilian Internees, signed at Seoul February 12, 1982,

T.I.A.S. 10406. *See also* UNITED STATES FORCES KOREA, REGULATION 190-6, ENEMY PRISONERS TRANSFERRED TO REPUBLIC OF KOREA CUSTODY (3 Apr. 1992). *See also* DOD PERSIAN GULF REPORT, at 583; and, Haiti AAR, *supra* note 19, 59 - 72 and App. R, for an overview of Detainee operations in Haiti.

^{lxxvi} DoD DIR. 2310.1, ¶C(3).

^{lxxvii} *See* Howard S. Levie, *The Employment of Prisoners of War*, 23 MIL. L. REV. 41, and Levie, at 213 - 254. *See generally*, Frank Kolar, *An Ordeal That Was Immortalized: Not all was fiction in the story of the bridge on the River Kwai*, MIL. HISTORY (Feb. 1987), at 58.

^{lxxviii} *See* Art. 40 & 51, GCC for an analogy. Detainee work should relate to feeding, sheltering, clothing, transport, and the health of other detainees or other nationals of the near-occupied territory.

^{lxxix} *See* DEP'T OF THE ARMY REGULATION 37-1, FINANCIAL ADMINISTRATION: ARMY ACCOUNTING AND FUND CONTROL (30 Apr. 1991), Chapter 36.

^{lxxx} The GCC provides the same maximum punishments for civilian internees. *See* Art. 119, GCC.

^{lxxxi} *See* 10 U.S.C. §802(a)(9) and 18 U.S.C. §3227.

It should be noted that at least 12 nations have made a reservation to Art. 85, GPW. The reservation in essence would deny a P.O.W. their protected status if convicted of a war crime. North Vietnam used their reservation under Art. 85 to threaten on several occasions the trial of American pilots as war criminals. *See* MARJORIE WHITEMAN, 10 DIGEST OF INTERNATIONAL LAW 231 - 234 (1968); J. Burnham, *Hanoi's Special Weapons System: threatened execution of captured American pilots as war criminals*, NAT. REV., Aug. 9, 1966; *Dangerous decision: captured American airmen up for trial?*, NEWSWEEK, July 25, 1966; *Deplorable and repulsive: North Vietnam plan to prosecute captured U.S. pilots as war criminals*, TIME, July 29, 1966, at 12 - 13. *See generally*, Joseph Kelly, *PW's as War Criminals*, MIL. REV. (Jan. 1972), at 91.

^{lxxxii} *See* Robinson O. Everett and Scott L. Silliman, *Forums For Punishing Offenses Against the Law of Nations*, 29 WAKE FOREST L. REV. 509 (1994).

^{lxxxiii} Between 1942 and 1946, 2,222 German P.O.W.s escaped from American camps in the U.S. At the time of repatriation, 28 still were at large. One remained at large and unaccounted for in the U.S. until 1995! None of the German P.O.W.s ever successfully escaped. During World War II, 435,788 German P.O.W.s were held on American soil (about 17 divisions worth). Of all the Germans captured by the British in Europe, only one successfully escaped and returned to his own forces. This German P.O.W. did this by jumping a prisoner train in Canada and crossing into the U.S., which at that time was still neutral. ALBERT BIDERMAN, *MARCH TO CALUMNY: THE STORY OF AMERICAN POW'S IN THE KOREAN WAR* 90 (1979) Jack Fincher, *By Convention, the enemy within never did without*, SMITHSONIAN (June 1995), at 127. *See also* ARNOLD KRAMMER, *NAZI PRISONERS OF WAR IN AMERICA* (1994).

See, A. Porter Sweet, *From Libby to Liberty*, MIL. REV. (Apr. 1971), at 63, for an interesting recount of how 109 union soldiers escaped a Confederate P.O.W. camp during the Civil War. *See* ESCAPE AND EVASION: 17 TRUE STORIES OF DOWNED PILOTS WHO MADE IT BACK (Jimmy Kilbourne, ed. 1973), for stories of servicemen who successful avoided capture after being shot down behind enemy lines or those who successfully escaped P.O.W. camps after capture. The story covers World War I through the Vietnam War. According to this book, only 3 Air Force pilots successfully escaped from captivity in North Korea. Official Army records show that 670 soldiers captured managed to escape and return to Allied control. However, none of the successful escapees had escaped from permanent POW camps. *See* Paul Cole, *I POW/MIA Issues, The Korean War* 42 (Rand Corp. 1994). *See also* George Skoch, *Escape Hatch Found: Escaping from a POW camp in Italy was*

one thing. The next was living off a war-torn land among partisans, spies, Fascists and German Patrols, MIL. HISTORY (Oct. 1988), at 34.

^{lxxxiv} See SWISS INTERNMENT OF PRISONERS OF WAR: AN EXPERIMENT IN INTERNATIONAL HUMANE LEGISLATION AND ADMINISTRATION (Samuel Lindsay, ed., 1917), for an account of POW internment procedures used during World War I.

^{lxxxv} But see 18 U.S.C. § 757 which makes it a felony, punishable by 10 years confinement and \$10,000 to procure "the escape of any prisoner of war held by the United States or any of its allies, or the escape of any person apprehended or interned as an enemy alien by the United States or any of its allies, or . . . assists in such escape . . . , or attempts to commit or conspires to commit any of the above acts. . . ."

^{lxxxvi} *Rex v. Krebs* (Magistrate's Court of the County of Renfrew, Ontario, Canada), 780 CAN. C.C. 279 (1943). The accused was a German POW interned in Canada. He escaped and during his escape he broke into a cabin to get food, articles of civilian clothing, and a weapon. The court held that, since these acts were done in an attempt to facilitate his escape, he committed no crime.

^{lxxxvii} Pictet, at 246. See also *id.*, at 246-248. Compare *Trial of Albert Wagner*, XIII THE UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF THE TRIAL OF WAR CRIMINALS, Case No. 75, 118 (1949), with *Trial of Erich Weiss and Wilhelm Mundo*, XIII THE UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF THE TRIAL OF WAR CRIMINALS, Case No. 81, 149 (1949).

Art. 42, GPW provides: "The use of weapons against prisoners of war, especially against those who are escaping or attempting to escape, shall constitute an extreme measure, which shall always be preceded by warnings appropriate to the circumstances."

^{lxxxviii} For a thorough list of resources on this issue, see BIBLIOGRAPHY ON REPATRIATION OF PRISONERS OF WAR (1960), a copy of which is maintained by the TJAGSA Library.

^{lxxxix} See R.R. Baxter, *Asylum to Prisoners of War*, BRITISH YEARBOOK INT'L L. 489 (1953).

^{xc} See Alfred Richeson, *The Four-Party Joint Military Commission*, MIL. REV. (Aug. 1973), at 16.

^{xc} See Scott R. Morris, *America's Most Recent Prisoner of War: The WO Bobby Hall Incident*, ARMY LAW., Sept. 1996, at 3.

^{xcix} Or was there? See The Korean Armistice Agreement, para. 52, *reprinted in*, DA PAM. 27-1, at 210.

^{xciii} The treatment of American P.O.W.s by the North Koreans was some of the worst conditions in history. Of the 6,656 Army soldiers taken prisoner during the war, only 3,323 were ultimately repatriated. Julius Segal, FACTORS RELATED TO THE COLLABORATION AND RESISTANCE BEHAVIOR OF U.S. ARMY PW'S IN KOREA 4 (Dec. 1956). See Note: *Misconduct in the Prison Camp: A Survey of the Law and an Analysis of the Korean Cases*, 56 COL. L. REV 709 (1956), for a detailed factual and legal analysis of Korean POWs experiences.

^{xciv} DoD issued guidance through Dep't of Def., Pamphlet 8-1, U.S. Fighting Man's Code first issued in November 1955 and revised three times. DoD also issued in July 1965, DoD Dir. 1300.7, Training and Education Measures Necessary to Support the Code of Conduct (July 8, 1964). However, this guidance left it to the individual services to develop, interpret, and train its servicemembers on the Code. This led to interpretation problems by U.S. P.O.W.s in North Vietnam.

^{xcv} Notice that the code applies to servicemembers. This can create a problem when civilians become prisoners of war. See Michael Kalapos, A Discussion Of The Relationship Of Military And Civilian Contractor Personnel In The Event Members Of Both Groups Become Prisoners of War (1987) (unpublished Executive Research Project, Industrial College of the Armed Forces), *available in* DTIC, ref. # AD-B115 978; James Clunan, Civilian-Military Relations Among Prisoners of War in

Southeast Asia: Applications Today (1987)(unpublished Executive Research Project, Industrial College of the Armed Forces), *available in* DTIC, ref. # AD-B115 905.

^{xcvi} See APPENDIX A. See also J. Jennings Moss, *Iraq tortured all Americans captured*, "WASH. TIMES, Aug. 2, 1991, at A1; Melissa Healy, *Pentagon Details Abuse of American POWs in Iraq; Gulf War: Broken Bones, Torture, Sexual Threats are Reported. It could spur further calls for War Crimes Trial*, L.A. TIMES, Aug. 2, 1991, at A1; and JOHN NORTON MOORE, CRISIS IN THE GULF: ENFORCING THE RULE OF LAW 70 - 75 (1994), for accounts of the abuse U.S. P.O.W.s were subjected to during the Gulf War.

^{xcvii} See Scott R. Morris, *America's Most Recent Prisoner of War: The WO Bobby Hall Incident*, ARMY LAW., Sept. 1996, at 3.

^{xcviii} See generally, Elizabeth R. Smith, Jr., *The Code of Conduct in Relation to International Law*, 31 MIL. L. REV. 85 (1966).

^{xcix} See generally, Richard E. Porter, *The Code of Conduct: A Guide to Moral Responsibility*, 32 AIR. UNIV. REV. 107 (Jan. - Feb. 1983).

^c See Charles L. Nichols, *Article 105, Misconduct as a Prisoner*, 11 JAG. L. REV. 393 (Fall 1969). During the Korean War, at least 24 American P.O.W.s informed on other P.O.W.s during escape attempts. "Twenty-two percent of returning PW's report being aware of outright mistreatment of prisoners by fellow prisoners -- including beatings resulting in death...." JULIUS SEGAL, FACTORS RELATED TO THE COLLABORATION AND RESISTANCE BEHAVIOR OF U.S. ARMY PW'S IN KOREA 33, 90 (Dec. 1956).

^{ci} See, e.g., *United States v. Floyd*, 18 C.M.R. 362 (A.B.M.R. 1954); *United States v. Dickenson*, 17 C.M.R. 438 (A.B.M.R. 1954), *aff'd* 20 C.M.R. 154 (C.M.A. 1955); *United States v. Batchelor*, 19 C.M.R. 452 (A.B.M.R. 1954). See also Edith Gardner, *Coerced Confessions of Prisoners of War*, 24 GEO. WASH. L. REV. 528 (1956). Eleven of the fourteen were ultimately convicted.

^{cii} There are four reasons presented by DoD to explain why collaborators were not prosecuted after Vietnam.

1. The Debriefers were instructed not to actively seek accusations because the emphasis was on gathering intelligence from the P.O.W.s
2. The Secretary of Defense had made a public statement saying no P.O.W.s who made propaganda statements would be prosecuted.
3. The service TJAGs said public opinion made convictions unlikely for P.O.W.s, who had already served extended periods of captivity in inhumane conditions.
4. The wording in the Manual for Courts-Martial implied that a member of one service component did not have to obey orders of superiors of a different component. [The MCM was amended on 3 Nov. 77 to correct this.]

See *The Code of Conduct: A Second Look* (U.S. Air Force Productions, 198_) [archive ref.# AFL 095-034-045, Pin #51190]. See generally, *Miller v. Lefman*, 801 F.2d 492 (D.C. Cir. 1986). LtCol Miller, U.S.M.C. was a P.O.W. that the SRO preferred charges against after the war.

^{ciii} *The Code of Conduct: a Second Look* (U.S. Air Force Productions, 198_)

^{civ} *Experiences of a P.O.W.* (TJAGSA Productions, Sept. 1985). This two hour videotape captures the incites of COL Nick Rowe. COL Rowe was captured by the North Vietnamese in 1964. He spent 5 1/2 years as a P.O.W. until he successfully escaped. COL Rowe's experiences and advice

were instrumental in developing SERE training. Tragically, COL Rowe was assassinated in the Philippines in December 1989.

^{cv} Experiences of a P.O.W. (TJAGSA Productions, Sept. 1985).

^{cvi} Experiences of a P.O.W. (TJAGSA Productions, Sept. 1985).

^{cvi} See Donald L. Manes, Jr., *Barbed Wire Command: The Legal Nature of the Command Responsibilities of the Senior Prisoner in a Prisoner of War Camp*, 10 MIL. L. REV. 1 (1960), and John R. Brancato, *Doctrinal Deficiencies in Prisoner of War Command*, AIRPOWER J. (Spr. 1988), at 40, for some of the problems the SRO faces during captivity.

^{cvi} See Bobby D. Wagnor, *Communication: the key element to prisoners of war survival*, 23 AIR. UNIV. REV. 33 (May - June 1976).

APPENDIX

UNITED STATES CENTRAL COMMAND
7115 South Boundary Boulevard
MacDill Air Force Base, Florida 33621-5101

REGULATION
NUMBER 27-13

07 FEB 1995

Legal Services CAPTURED PERSONS. DETERMINATION OF ELIGIBILITY FOR ENEMY PRISONER OF WAR STATUS

1. **PURPOSE.** This regulation prescribes policies and procedures for determining whether persons who have committed belligerent acts and come into the power of the United States Forces are entitled to enemy prisoner of war (EPW) status under the Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949 (GPW).
2. **APPLICABILITY.** This regulation is applicable to all members of the United States Forces deployed to or operating in support of operations in the US CENTCOM AOR.
3. **REFERENCES.**
 - a. Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949.
 - b. DA Pamphlet 27-1, Treaties Governing Land Warfare, December 1956.
 - c. FM 27-10, The Law of Land Warfare, July 1956.
 - d. J. Pictet, Commentary on the Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949, International Committee of the Red Cross.
4. **GENERAL.**
 - a. Persons who have committed belligerent acts and are captured or otherwise come into the power of the United States Forces shall be treated as EPWs if they fall into any of the classes of persons described in Article 4 of the GPW (Annex A).
 - b. Should any doubt arise as to whether a person who has committed a belligerent act falls into one of the classes of persons entitled to EPW status under GPW Article 4, he shall be treated as an EPW until such time as his status has been determined by a Tribunal under this regulation.
 - c. No person whose status is in doubt shall be transferred from the power of the United States to another detaining power until his status has been determined by a Tribunal convened under GPW Article 5 and this regulation.

Note: This regulation has been re-formatted for this publication.
--

5. DEFINITIONS.

a. Belligerent Act. Bearing arms against or engaging in other conduct hostile to United States' persons or property or to the persons or property of other nations participating as Friendly Forces in operations in the USCENTCON AOR.

b. Convening Authority. An officer designated by the Commander, U.S. Central Command (CENTCOM) to convene GPW Article 5 Tribunals.

c. Detainee. A person, not a member of the US Forces, in the custody of the United States Forces who is not free to voluntarily terminate that custody.

d. Enemy Prisoner of War (EPW). A detainee who has committed a belligerent act and falls within the one of the classes of persons described in the GPW Article 4.

e. Interpreter. A person competent in English and Arabic (or other language understood by the Detainee) who assists a Tribunal and/or Detainee by translating instructions, questions, testimony, and documents.

f. A Person Whose Status is in Doubt. A detainee who has committed a belligerent act, but whose entitlement to status as an EPW under GPW Article 4 is in doubt.

g. President of the Tribunal. The senior Voting member of each Tribunal. The President shall be a commissioned office serving in the grade of 04 or above.

h. Recorder. A commissioned officer detailed to obtain and present evidence to a Tribunal convened under this regulation and to make a record of the proceedings thereof.

i. Retained Persons. Members of the medical service and chaplains accompanying the enemy armed forces who come into the custody the US forces who are retained in the custody to administer to the needs of the personnel of their own forces.

j. Screening Officer. Any US military or civilian employee of the Department of Defense who conducts an initial screening or interrogation of persons coming into the power of the United States Forces.

k. Tribunal. A panel of three commissioned officers, at least one of who must be a judge advocate, convened to make determinations of fact, pursuant to GPW Article 5 and this regulation.

6. BACKGROUND.

a. The United States is a state-party to the four Geneva Conventions of 12 August 1949. One of these conventions is the Geneva Convention Relative to the Treatment of Prisoners of War. The text of this convention may be found in DA Pamphlet 27-1.

b. By its terms, the GPW would apply to an armed conflict between the United States and any country.

c. The GPW provides that any person who has committed a belligerent act and thereafter comes into the power of the enemy will be treated as an EPW unless a competent Tribunal determines that the person does not fall within a class of persons described in GPW Article 4.

d. Some detainees are obviously entitled to EPW status, and their cases should not be referred to a Tribunal. These include personnel of enemy armed forces taken into custody on the battlefield.

e. Medical personnel and chaplains accompanying enemy armed forces are not combatants; therefore, they are not EPWs upon capture. However, they may be retained in custody to administer to EPWs.

f. When a competent Tribunal determines that a detained person has committed a belligerent act as defined in this regulation, but that the person does not fall into one of the classes of persons described in GPW Article 4, that person will be delivered to the Provost Marshal for disposition as follows:

(1) If captured in enemy territory. In accordance with the rights and obligations of an occupying power under the Law of Armed Conflict (See reference at paragraph 7c).

(2) If captured in territory of another friendly state. For delivery to the civil authorities unless otherwise directed by competent US authority.

7. RESPONSIBILITIES.

a. All US military and civilian personnel of the Department of Defense (DoD) who take or have custody of a detainee will:

(1) Treat each detainee humanely and with respect.

(2) Apply the protections of the GPW to each EPW and to each detainee whose status has not yet been determined by a Tribunal convened under this regulation.

b. Any US military or civilian employee of the Department of Defense who fails to treat any detainee humanely, respectfully or otherwise in accordance with the GPW, may be subject to punishment under the UCMJ or as otherwise directed by competent authority.

c. Commanders will:

(1) Ensure that personnel of their commands know and comply with the responsibilities set forth above.

(2) Ensure that all detainees in the custody of their forces are promptly evacuated, processed, and accounted for.

(3) Ensure that all sick or wounded detainees are provided prompt medical care. Only urgent medical reasons will determine the priority in the order of medical treatment to be administered.

(4) Ensure that detainee's determined not to be entitled to EPW status are segregated from EPWs prior to any transfer to other authorities.

d. The Screening Officer will:

(1) Determine whether or not each detainee has committed a belligerent act as defined in this regulation.

(2) Refer the cases of detainees who have committed a belligerent act and who may not fall within one of the classes of persons entitled to EPW status under GPW Article 4 to a Tribunal convened under this regulation.

(3) Refer the cases of detainees who have not committed a belligerent act, but who may have committed an ordinary crime, to the Provost Marshal.

(4) Seek the advice of the unit's servicing judge advocate when needed.

(5) Ensure that all detainees are delivered to the appropriate US authority, e.g., Provost Marshal, for evaluation, transfer or release as appropriate.

e. The USCENTCOM SJA will:

(1) Provide legal guidance, as required to subordinate units concerning the conduct of Article 5 Tribunals.

(2) Provide judge advocates to serve on Article 5 Tribunals as required.

(3) Determine the legal sufficiency of each hearing in which a detainee who committed a belligerent act was not granted EPW status. Where a Tribunal's decision is determined not to be legally sufficient, a new hearing will be ordered.

(4) Retain the records of all Article 5 Tribunals conducted. Promulgate a Tribunal Appointment Order IAW Annex B of this regulation.

f. Tribunals will:

(1) Following substantially the procedures set forth at Annex C of this regulation, determine whether each detainee referred to that Tribunal:

(a) Did or did not commit a belligerent act as defined in this regulations and, if so, whether the detainee

(b) Falls or does not fall within one of the classes of persons entitled to EPW status under Article 4 of the GPW.

(2) Promptly report their decisions to the convening authority in writing.

g. The servicing judge advocate for each unit capturing or otherwise coming into the possession of new detainees will provide legal guidance to Screening Officers and others concerning the determination of EPW status as required.

8. PROPONENT. The proponent of this regulation is the office of the Staff Judge Advocate, CCJA. Users are invited to send comments and suggested improvements on DA Form 2028 (Recommended Changes to Publications and Blank Forms) directly to United States Central Command, CCJA, 7115 South Boundary Boulevard, MacDill Air Force Base, Florida 33621-5101.

FOR THE COMMANDER IN CHIEF:

R. I. NEAL
LtGen, USMC
Deputy Commander in Chief and
Chief of Staff

OFFICIAL:
ROBERT L. HENDERSON
LTC, USA
Adjutant General

DISTRIBUTION:
A (1 Ea)

APPENDIX A

EXCERPT FROM THE GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR, 12 AUGUST 1949

Article 4

A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

(1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.

(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:

(a) that of being commanded by a person responsible for his subordinates:

(b) that of having a fixed distinctive sign recognizable at a distance;

(c) that of carrying arms openly;

(d) that of conducting their operations in accordance with the laws and customs of war.

(3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

(4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labor units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.

(5) Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favorable treatment under any other provisions of international law.

(6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units provided they carry arms openly and respect the laws and customs of war.

B. The following shall likewise be treated as prisoners of war under the present Convention:

(1) Persons belonging, or having belonged, to the armed forces of the Occupied country, if the occupying Power considers it necessary by reason of such allegiance to intern them, even though it has originally liberated them while hostilities were going on outside the territory it

occupies, in particular where such persons have made an unsuccessful attempt to rejoin the armed forces to which they belong and which are engaged in combat, or where they fail to comply with a summons made to them with a view to internment.

(2) The persons belonging to one of the categories enumerated in the present Article, who have been received by neutral or non-belligerent Powers on their territory and whom these Powers are required to intern under international law, without prejudice to any more favorable treatment which these Powers may choose to give and with the exception of Articles 8, 10, 15, 30, fifth paragraph 58-67, 92, 126 and; where diplomatic relations exist between the Parties to the conflict and the neutral or non-belligerent Power concerned, those Articles concerning the Protecting Power. Where such diplomatic relations exist, the Parties to a conflict on whom these persons depend shall be allowed to perform towards them the functions of a Protecting Power as provided in the present Convention, without prejudice to the functions which these Parties normally exercise in conformity with diplomatic and consular usage and treaties.

C. This Article shall in no way affect the status of medical personnel and chaplains as provided for in Article 33 of the present Convention.

Article 5

The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

APPENDIX B

UNITED STATES CENTRAL-COMMAND
7115 South Boundary Boulevard
MacDill Air Force Base, Florida 33621-5101

APPOINTMENT OF TRIBUNAL

A Tribunal under Article 5 of the Geneva Convention Relative to the Treatment of Prisoners of War is hereby convened. It will hear such cases as shall be brought before it pursuant to USCENTCOM Regulation 27-13 without further action of referral or otherwise.

The following commissioned officers shall serve as members of the Tribunal:

MEMBERS:

Major A. B. Doe, USA, 999-99-9999; President

Captain R. C. Shaw, JAGC, USA, 999-99-9999; Judge Advocate, Member

1st Lt C. Logan, USA, 999-99-9999; Member

FOR THE COMMANDER IN CHIEF:

STAFF JUDGE ADVOCATE

APPENDIX C

TRIBUNAL PROCEDURES

1. JURISDICTION. Tribunals convened pursuant to this regulation shall be limited in their deliberations to the determination of whether detained persons ordered to appear before it are entitled to EPW status under the GPW.
2. APPLICABLE LAW. In making its determination of entitlement to EPW status the Tribunal should apply the following:
 - a. Hague Convention No. IV Respecting the Laws and Customs of War on Land and Annex Thereto Embodying Regulations Respecting the Laws and Customs of Warfare on Land, 18 October 1907; 36 Stat. 2277; TS 539; 1 Bevans 631.
 - b. Geneva Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field, 12 August 1949; 6 UST 3114; TIAS 3362; 75 UNTS 31.
 - c. Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces, 12 August 1949; 6 UST 3217; TIAS 3363; 75 UNTS 85.
 - d. Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949; 6 UST 3316; TIAS 3364; 75 UNTS 135.
 - e. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949; 6 UST 3516; TIAS 3365; 75 UNTS 287.
3. COMPOSITION.
 - a. Interpreter. Each Tribunal will have an interpreter appointed by the President of the Tribunal who shall be competent in English and Arabic (or other language understood by the Detainee). The interpreter shall have no vote.
 - b. Recorder. Each Tribunal shall have a commissioned officer appointed by the President of the Tribunal to obtain and present all relevant evidence to the Tribunal and to cause a record to be made of the proceedings. The recorder shall have no vote,
 - c. Tribunal. A panel of three commissioned officers, at least one of whom must be a judge advocate, convened to make determinations of fact pursuant to GPW Article 5 and this regulation. The senior member of each Tribunal shall be an officer serving in the grade of O-4 or above and shall be its President.
4. POWERS OF THE TRIBUNAL. The Tribunal shall have the power to:
 - a. Determine the mental and physical capacity of the detainee to participate in the hearing.

b. Order U.S. military witnesses to appear and to request the appearance of civilian witnesses.

c. Require the production of documents and real evidence in the custody of the United States and to request host nation assistance in the production of documents and evidence not in the custody of the United States.

d. Require each witness to testify under oath. A form of oath for Muslim witnesses is attached (Annex E). The oath will be administered by the judge advocate member of the Tribunal.

5. RIGHTS OF THE DETAINEE.

a. The detainee shall have the right to be present at all open sessions of the Tribunal.

b. The detainee may not be compelled to testify.

c. The detainee shall not have the right to legal counsel, however, the detainee may have a personal representative assist him at the hearing if that personal representative is immediately available.

d. The detainee shall be informed, in Arabic (or other language understood by the Detainee) of the purpose of the Tribunal, the provisions of GPW Articles 4 and 5, and of the procedure to be followed by the Tribunal.

e. The detainee shall have the right to present evidence to the Tribunal, including the testimony of witnesses who are immediately available.

f. The detainee may examine and cross-examine witnesses, and examine evidence. Documentary evidence may be masked, as necessary, to protect sensitive sources and methods of obtaining information.

g. The detainee shall be advised of the foregoing rights at the beginning of the hearing.

6. APPLICABLE PROCEDURE.

a. Admissibility of Evidence. All evidence, including hearsay evidence, is admissible. The Tribunal will determine the weight to be given to evidence considered.

b. Control of Case. The hearing is not adversarial, but rather is a fact-finding procedure. The President of the Tribunal, and other members of the Tribunal with the President's consent, will interrogate the detainee, witnesses, etc. Additionally, the President of the Tribunal may direct the Recorder to obtain evidence in addition to that presented.

c. Burden of Proof.

(1) Under this regulation, a matter shall be proven as fact if the fact-finder is persuaded of the truth of the matter by a preponderance of the evidence.

(2) Unless it is established by a preponderance of the evidence that the detainee is not entitled to EPW status, the detainee will be granted EPW status.

d. Voting. The decisions of the Tribunal shall be determined by a majority of the voting members of the Tribunal.

e. Legal Review. The USARCENT Staff Judge Advocate shall determine the legal sufficiency of each hearing in which a detainee who committed a belligerent act was not granted EPW status. In such cases, the detainees shall be entitled to continued EPW treatment pending completion of the legal review. Where a Tribunal's decision is determined not to be legally sufficient, a new hearing will be ordered.

7. CONDUCT OF HEARING. The Tribunal's hearing shall be substantially as follows:

a. The President upon calling the Tribunal to order should first announce the order appointing the Tribunal (See Annex F).

b. The Recorder will cause a record to be made of the time, date, and place of the hearing, and the identity and qualifications of all participants.

c. The President should advise the detainee of his rights, the purpose of the hearing and of the consequences of the Tribunal's decision.

d. The Recorder will read the report of the Screening Officer or other interrogating officer summarizing the facts upon which the interrogating officer's referral was based and will present all other relevant evidence available.

e. The Recorder will call the witnesses, if any. Witnesses will be excluded from the hearing except while testifying. An oath or affirmation will be administered to each witness by the judge advocate member of the Tribunal.

f. The Detainee shall be permitted to present evidence. The Recorder will assist the Detainee in obtaining the production of documents and the presence of witnesses immediately available.

g. The Tribunal will deliberate in closed session. Only voting members will be present. The Tribunal will make its determination of status by a majority vote. The junior voting member will summarize the Tribunal's decision on the Report of Tribunal Decision (Annex D). The decisions will be signed by each voting member.

h. The President will announce the decision of the Tribunal in open session,

8. POST HEARING PROCEDURES.

a. The Recorder will prepare the record of the hearing.

b. In cases in which the detainee has been determined not to be entitled to EPW status, the following items will be attached to the decision:

(1) A statement of the time and place of the hearing, persons present, and their qualifications.

(2) A brief resume of the facts and circumstances upon which the decision was based.

(3) A summary or copies of all evidence presented to the Tribunal.

c. In cases in which the detainee has been determined to be entitled to EPW status no record of the proceedings is required.

d. The original and one copy of the Tribunal's decision and all supporting documents will be forwarded by the President to the convening authority within one week of the date of the announcement of the decision.

APPENDIX D

REPORT OF TRIBUNAL DECISION

TRIBUNAL CONVENED BY: (ORDER NUMBER / HEADQUARTERS / DATE)

CASE NO: _____

DATE: _____

LOCATION: (UNIT, GEOGRAPHIC LOCATION)

In Re:† _____, Respondent

This Tribunal, having been directed to make a determination as to the legal status of the above-named respondent under Article 5 of the Geneva Convention Relative to the Treatment of Prisoners of War, who came into the power of (UNIT) of the Armed Forces of (NATION) at (GEOGRAPHIC LOCATION) on or about (DATE) and having examined all available evidence, has determined that he (is) (is not) an Enemy Prisoner of War as defined in Article 4 of the Convention.

Additional identifying information concerning the detainee is follows.

Rank:† _____

Service Number:† _____

Date of Birth:† _____

Unit:‡ _____

Place of Birth: ‡ _____

Father's name: ‡ _____

Mother's name: ‡ _____

Spouse's name: ‡ _____

Home Town: ‡ _____

Aliases, if any: ‡ _____

IT IS ORDERED that the Respondent: (Here include the Tribunal's direction as to the disposition of the respondent, e.g., "Delivered to the Provost Marshal for Transfer to an EPW camp" or "Delivered to Civil Authorities" or "Released from Custody.")

(Rank, Name), President,*
(Unit, Social Security No.)

(Rank, Name, Member,*
(Unit, Social Security No.)

(Rank, Name), Member,*

(Unit, Social Security No.)

The decision of the foregoing Tribunal in which the detainee was determined not to be entitled to EPW status has been determined to be legally sufficient/insufficient.

FOR THE USARCENT STAFF JUDGE ADVOCATE

Rank, Name, Title

† An FPW is required by the GPW to provide this information.

‡ An EPW may not be compelled to provide this information.

* Judge Advocate Member will so indicate

APPENDIX E

FORM OF OATH FOR A MUSLIM

In the Name of Allah, the Most Compassionate, the Most Merciful, who gave us Muhammad His Prophet and the Holy Koran, I, (NAME), swear that my testimony before this Tribunal will be the truth.

APPENDIX F

ARTICLE FIVE TRIBUNAL HEARING GUIDE

RECORDER: All Rise (The Tribunal enters)

PRESIDENT: (NAME OF DETAINEE), this Tribunal is convened by order of _____ under the provisions of Article Five of the Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949. It will determine whether you have committed a belligerent act against the United States Armed Forces or Other Friendly Forces acting pursuant to United Nations Security Council Resolution 678 and, if so, whether you fall within one of the classes of persons entitled to treatment as a prisoner of war.

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: (NAME OF DETAINEE), you have the following rights during this hearing:

You have the right to be present at all open sessions of the Tribunal. However, if you become disorderly, you will be removed from the hearing, and the Tribunal will continue to hear evidence.

You may not be compelled to testify. However, you may testify if you wish to do so.

You may have a personal representative assist you at the hearing if that personal representative is immediately available.

You have the right to present evidence to this Tribunal, including the testimony of witnesses who are immediately available.

You may ask questions of witnesses and examine documents offered in evidence. However, certain documents may be partially masked for security reasons.

INTERPRETER. (TRANSLATION OF ABOVE)

PRESIDENT: Do you understand these rights?

INTERPRETER: (TRANSLATION OF ABOVE)

PRESIDENT: Do you have any questions concerning these rights?

INTERPRETER: (TRANSLATION OF ABOVE)

RECORDER: All rise.

PRESIDENT: (DETAINEE), this Tribunal has determined:

(That you have not committed a belligerent act; therefore, you will be released.)

(That you have committed a belligerent act, but you are entitled to Prisoner of War status. You will be delivered to the Provost Marshal for evacuation to a Prisoner of War Camp.)

(That you have committed a belligerent act, but that you are NOT entitled to Prisoner of War status. This decision will be reviewed by higher authority. Until then, you will remain in American custody. If this decision is confirmed upon review by higher authority, you will be transferred to the appropriate authorities for further legal proceedings.)

INTERPRETER: (TRANSLATION OF ABOVE)

PRESIDENT: This hearing is adjourned.